Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

July 8, 1992

Mr. Marvin E. Edwards
General Superintendent
Dallas Independent School District
3700 Ross Avenue
Dallas, Texas 75204-5491

OR92-386

Dear Mr. Edwards:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, article 6252-17a, V.T.C.S. Your request was assigned ID# 16372.

The Dallas Independent School District (the district) received an open records request for "[a]ny letter sent by any school district official since April 6 notifying any employee of the district's intention to terminate the employee." You contend that the notices of termination, which specify the grounds for the termination, come under the protection of sections 3(a)(2), 3(a)(3), and 3(a)(11) of the Open Records Act.

Section 3(a)(2) is designed to protect public employees' personal privacy. The scope of section 3(a)(2) protection, however, is very narrow. *See* Open Records Decision Nos. 336 (1982); 257 (1980) (enclosed). The test for section 3(a)(2) protection is the same as that for information protected by common-law privacy under section 3(a)(1): to be protected from required disclosure the information must contain highly intimate or embarrassing facts about a person's *private* affairs such that its release would be highly objectionable to a reasonable person *and* the information must be of no legitimate concern to the public. *Hubert v. Harte-Hanks Texas Newspapers, Inc.*, 652 S.W.2d 546, 550 (Tex. App. -- Austin 1983, writ ref'd n.r.e.). The information at issue pertains solely to district employees' actions as public servants, and as such cannot be deemed to be outside the realm of public

interest. Section 3(a)(2) was not intended to protect the type of information at issue here.[1]

To secure the protection of section 3(a)(3), a governmental body must demonstrate that the requested information "relates" to pending or reasonably anticipated judicial or quasi-judicial proceeding. Open Records Decision No. 551 (1990). The mere chance of litigation will not trigger the 3(a)(3) exception. Open Records Decision Nos. 331, 328 (1982). To demonstrate that litigation is reasonably anticipated, the governmental body must furnish evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.*

It is not clear whether it is your contention that the district's termination process constitutes "litigation" for purposes of section 3(a)(3). In this instance, however, we need not reach this issue. As noted in Open Records Decision No. 551, the purpose of the litigation exception is to require the parties to the litigation to obtain relevant information from the opposing party by utilizing the discovery process. In this instance, both parties participating in the process have already obtained the requested information. Absent special circumstances, once information has been obtained by all parties to the litigation, no section 3(a)(3) interest exists with respect to that information. Open Records Decision Nos. 349, 320 (1982). Accordingly, section 3(a)(3) is inapplicable to these records.

Section 3(a)(11) of the act excepts inter-agency and intra-agency memoranda and letters, but only to the extent that they contain advice, opinion, or recommendation intended for use in the deliberative process. Open Records Decision No. 538 (1990). The purpose of this section is "to protect from public disclosure advice and opinions on policy matters and to encourage frank and open discussion within the agency in connection with its decision-making processes." *Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.--San Antonio 1982, writ ref'd n.r.e.).

You contend that the letters of notice come under the protection of section 3(a)(11) because the letters in effect constitute a recommendation to the superintendent that the employees be terminated. However, not everything labelled

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[1]We also note that the requested letters may not be withheld under the Open Records Act merely because the information might place employees in a "false light." As noted in Open Records Decision No. 579 (1990) (copy enclosed), the gravamen of a false light privacy complaint is not that the information revealed is confidential, but that it is false. Therefore, exceptions to the Open Records Act, focused on the confidentiality of information, do not embrace this particular tort doctrine.

"recommendation" may be withheld from the public. For information to be protected by section 3(a)(11), it must be demonstrated that the release of the information would inhibit the free flow of discussion -- the essential "give-and-take" -- of the decision-making process. *See* Open Records Decision No. 439 (1986) and authorities cited therein (copy enclosed). It is clear to this office that in this instance such is not the case. The notices sent to the employees are form letters with the grounds for termination inserted into the body of the text. These letters do not contain the type of discussion that section 3(a)(11) was intended to protect. Accordingly, the district must release the requested records.

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please refer to OR92-386.

Yours very truly,

William Walker
Assistant Attorney General
Opinion Committee

WW/RWP/lmm

Ref.: ID# 16372
ID# 16382

Enclosures: Open Records Decision Nos. 579, 439, 257

cc: Mr. Joseph Garcia
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(w/o enclosures)